UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DAVID MILLER, et al.

Plaintiffs,

v.

VENTRO CORPORATION, et al.

Defendants.

_____/

No. C 01-01287 SBA (EDL)

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL PLAINTIFF'S ANSWER TO INTERROGATORY 5

To satisfy the heightened pleading requirements for securities fraud litigation contained in the Private Securities Litigation Reform Act of 1995, Plaintiffs relied heavily in their complaint on twenty-two Confidential Witnesses (CWs) to plead their fraud claims with particularity. These CWs allegedly have information supporting Plaintiffs' claims that Defendants' system architecture did not have the capabilities described in Defendants' SEC filings. Plaintfifs did not identify the CWs by name.

At issue in this motion to compel is Defendants' Interrogatory 5, which states: "Identify all Confidential Witnesses described in or referenced in the Complaint." In response, Plaintiffs stated: "Plaintiff hereby incorporates the General Objections above. Plaintiff has identified the confidential witnesses in their initial disclosures. Plaintiff otherwise objects to this Request on the basis of attorney-work product." Plaintiffs' initial disclosures list more than 200 individuals who are believed to have discoverable information. Defendants state that while some of those individuals can be ruled out as not matching the complaint's general descriptions of

the CWs, there are at least 165 persons who appear to fit the various CW descriptions. Defendants also dispute the work product claim.

The Court held a hearing on April 20, 2004 at which all parties were represented by counsel. Based on the parties' papers and their oral argument, the Court enters the following Order.

There is no binding authority on the question of whether the identities of the CWs in a securities class action are discoverable. District courts have split on the issue, albeit based in part on factual differences. Compare In re Aetna Inc. Securities Litigation, 1999 WL 354527 (E.D. Pa.) (granting the defendants' motion to compel response to interrogatories seeking the identity of persons described only generally in the complaint where the plaintiffs objected based on the work product doctrine and referred the defendants to the plaintiffs' list of 750 individuals with discoverable information; holding that the interrogatories sought relevant factual information and that the need for the information outweighed the minimal work product protection, if any, the information may have); In re Theragenics Corp. Securities Litigation, 205 F.R.D. 631 (N.D. Ga. 2002) (following Aetna and granting the defendants' motion to compel answers to interrogatories seeking identities of individuals upon whom the plaintiffs relied in making the allegations in the complaint; holding that the information is not entitled to work product protection and disclosure of the names is consistent with the policies of the Private Securities Litigation Reform Act); In re Northpoint Communications Group, Inc., C-01-1473 WHA (Judge Alsup stated in a telephone conference that when a plaintiff showcases information obtained from confidential witnesses in an effort to meet the requirements of the Private Securities Litigation Reform Act, the plaintiff must disclose the identities of those witnesses upon proper interrogatory); with In re MTI Technology Corp. Securities Litigation II, 2002 U.S. Dist. LEXIS 13015 (C.D. Cal.) (holding that the identity of the witnesses interviewed by the attorneys and linked to specific allegations in the complaint was protected by the work product doctrine, focusing on the facts that the 71 potential witnesses were either currently or previously employed by Defendant, that 71 potential witnesses was not an unmanageable number for which to conduct discovery, that disclosure would not further the policies of the Private Securities Litigation Reform Act and that the witnesses could experience retaliation); In re Ashworth, Inc. Securities Litigation, 213 F.R.D. 385 (S.D. Cal. 2002) (finding the MTI reasoning persuasive to deny a motion to compel identification of witnesses who provided information that formed the basis for any allegations in the complaint based on work product doctrine, where the plaintiff had refused to substantively respond to interrogatories and referred to a list of over 100

persons with discoverable information, and there was no substantial need and undue hardship to overcome the work product protection).

Under the circumstances of this case, the Court is persuaded by the reasoning in Aetna and Theragenics. The Court holds that a list containing the names of the twenty-two CWs does not constitute work product and that even if it were work product, the need for the information and the hardship otherwise entailed outweighs any minimal work product protection. Because Plaintiffs chose to build their complaint on a foundation of statements from the twenty-two CWs, the identities of those individuals are highly relevant and reasonably calculated to lead to discoverable evidence. Moreover, the issue of disclosure is really a matter of when, not whether. The fact discovery cutoff of September 2, 2004 is rapidly approaching, all motions must be heard by November 9, 2004 and trial begins on January 19, 2005. Accordingly, the identities of most if not all of these CWs will be revealed in the next few months, either in a class certification motion, in any number of pretrial motions or at trial. It would be unfair to permit Plaintiffs to rely so heavily on the CWs in the complaint, yet to keep those identities from Defendants, especially given the schedule in this case. Defendants are not seeking any documents prepared by counsel, but are instead seeking a list of the subset of highly relevant potential witnesses. This list would not reveal counsel's mental impressions or processes and therefore is not protected by the work product doctrine.

Even if the list were protected by the work product doctrine, the need for the information under the procedural posture of this case outweighs the minimal work product protection, due to the timing of this case and to the relatively large list of potential witnesses. Plaintiffs made no showing that disclosure now rather than in the coming months would cause undue prejudice. Plaintiffs' counsel's statement at the hearing that disclosure should be denied because some of the descriptions in the complaint are sufficiently detailed to enable Defendants to identify the individuals from the list of potential witnesses is unavailing; to the extent that the complaint enables identification, there is no confidentiality to preserve. Finally, while the Court recognizes that the number of potential witnesses in this case is not as large as in Aetna, it is substantially more than in MTI and Ashworth. Given the compressed discovery schedule, it is simply not practical for Defendants to interview or depose all 165 individuals who could possibly be the CWs.

Accordingly, it is hereby ordered that Defendants' motion to compel further response to interrogatory 5 is granted. Plaintiffs need not disclose that counsel spoke to certain witnesses, or the substance of any interviews, but shall disclose a list of the identities of the twenty-two CWs to Defendants. Plaintiffs need not

link up any particular CW with a paragraph in the complaint, and may identify the witnesses in any order. No later than April 26, 2004, Plaintiffs shall either disclose the list or file objections to this Order with Judge Armstrong.

The Court declines to enter a protective order limiting the disclosure of these witnesses' identities because there has been no showing on this record of good cause. Although the Court agrees that, in general, whistle-blowers may often need protection from retaliation, here Plaintiffs conceded at the hearing that there was no evidence of any likelihood of retaliation in this case. None of the twenty-two CWs are current employees of Defendants, and Defendants' company no longer exists in the form that it previously did. The Court appreciates Plaintiffs' zealous attempts to protect the identities of these individuals, but without any showing of specific need, a protective order is not warranted. Of course, Plaintiffs may inform the witnesses of this Court's Order and their right to talk or not talk to the Defendants informally as they see fit. And, if any retaliation or abuse occurs, the Court will take prompt action, as Defendants recognized at the hearing.

IT IS SO ORDERED.

Dated: April 21, 2004

__/electronic signature authorized/_____
ELIZABETH D. LAPORTE
United States Magistrate Judge